

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 09-50026

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In the Matter of:

GENERAL MOTORS CORPORATION, et al.,

Debtors.

- - - - -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

July 22, 2009

9:45 AM

B E F O R E:

HON. ROBERT E. GERBER

U.S. BANKRUPTCY JUDGE

HEARING re Motion to Reject Lease or Executory Contract

HEARING re Motion to Reject Lease, Unexpired Leases of
Nonresidential Real Property

HEARING re (Doc. 2647 & 2648) Amended Debtors' Second Omnibus
Motion Pursuant to 11 U.S.C. Section 365 to Reject Certain
Executory Contracts

HEARING re Debtors' Third Omnibus Motion Pursuant to 11 U.S.C.
Section 365 to Reject Certain Executory Contracts

HEARIG re Motion of Debtors for Entry of Order Pursuant to 11
U.S.C. Section 521 and Fed. R. Bankr. P. 1007(C) Further
Extending Time to File Schedules of Assets and Liabilities,
Schedules of Executory Contracts and Unexpired Leases, and
Statements of Financial Affairs

Transcribed By: Clara Rubin

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DENNIS A. PRIETO, IN PRO PER (TELEPHONICALLY)

Interested Party

1 P R O C E E D I N G S

2 THE COURT: Good morning. Be seated, please.

3 Okay, GM.

4 (Pause)

5 THE COURT: Let's see if we can make some room at the
6 counsel table for everybody who wants room at the counsel
7 table, please.

8 MR. LEDERMAN: Good morning, Your Honor. Evan
9 Lederman, Weil, Gotshal & Manges, for the debtors.

10 THE COURT: Good morning, Mr. Lederman.

11 MR. LEDERMAN: Good morning, Your Honor. We have one
12 contested matter on today.

13 THE COURT: Yes.

14 MR. LEDERMAN: If Your Honor would like us to start
15 with that, or if you want to go through the uncontested
16 matters?

17 THE COURT: No, normally what I would prefer,
18 Mr. Lederman, is you deal with the uncontested matters, freeing
19 me up to take the argument that's necessary or appropriate on
20 the contested one.

21 MR. LEDERMAN: Go through the uncontested matters
22 first, Your Honor?

23 THE COURT: Yes, sir.

24 MR. LEDERMAN: Okay, sure. The first uncontested
25 matter is our -- the debtors' motion to reject certain

1 unexpired leases of nonresidential real property; that was
2 filed by our co-counsel Jenner & Block. I'll call up Daniel
3 Tehrani to address that motion.

4 THE COURT: All right.

5 Mr. Tehrani is it?

6 MR. TEHRANI: Good morning, Your Honor. My name is
7 Daniel Tehrani, Jenner & Block, as special --

8 THE COURT: You want to pull the microphone closer to
9 you?

10 MR. LEDERMAN: Sure.

11 THE COURT: And I think I heard your name but I wasn't
12 sure. Tehrani was it?

13 MR. TEHRANI: Yeah, Tehrani --

14 THE COURT: Okay.

15 MR. TEHRANI: -- from Jenner & Block, special counsel
16 to the debtors, Motors Liquidation Company, formally General
17 Motors, in support of two unopposed motions --

18 THE COURT: Can I ask you to speak slower, louder and
19 into the microphone, please?

20 MR. TEHRANI: I'm sorry. In support of two unopposed
21 motions to reject certain executory contracts and unexpired
22 leases. The motions are unopposed and draft orders have been
23 submitted to Your Honor's chambers.

24 THE COURT: Okay, they're granted.

25 Mr. Lederman?

1 MR. LEDERMAN: Your Honor, the next uncontested matter
2 is the fourth item on the agenda, the debtors' amended second
3 omnibus motion to reject certain executory contracts. There
4 was one objection that was filed by Macquarie Equipment
5 Finance. The debtors have been able to resolve that objection
6 and they filed a notice of withdrawal. So that objection has
7 been resolved.

8 There are no other objections to this motion. It is
9 seeking rejection of various contracts, including engineering
10 service contracts, human resources contracts and other related
11 purchase agreements that are not in the best interests of
12 debtors' estate to retain on an ongoing basis.

13 Seeing that there is no other objection, we ask Your
14 Honor to approve that motion.

15 THE COURT: Yes, granted.

16 MR. LEDERMAN: Thank you, Your Honor. The next
17 uncontested matter is also a -- I'm sorry, the next uncontested
18 matter is the motion for the debtors to extend their time to
19 file schedules. We are working with the U.S. Trustee's Office
20 to try and figure out the best format and way to present these
21 schedules following the 363 transaction, and when we decide on
22 a format we'll come back to Your Honor and present that. So at
23 this time we have no further update besides to let you know
24 that we're trying to work out a good format with the United
25 States Trustee's Office.

1 THE COURT: Okay. That's fine. How should we deal
2 with that as a matter of docketing and calendaring and so
3 forth, in your view, Mr. Lederman?

4 MR. LEDERMAN: I think we would ask Your Honor to
5 approve the extension while we work out the format with the
6 U.S. Trustee's Office.

7 THE COURT: Okay. And you've got a proposed order to
8 do that?

9 MR. LEDERMAN: We do, Your Honor.

10 THE COURT: Okay. Fair enough.

11 MR. LEDERMAN: Thank you. The third matter was an
12 adjourned matter; it's an adversary proceeding that will be
13 going forward, I believe, on September 30th at 10:30 a.m., Your
14 Honor.

15 THE COURT: Okay. So --

16 MR. LEDERMAN: And that concludes the uncontested and
17 adjourned matters.

18 THE COURT: All right, so now we're down to the third
19 omnibus rejection motion, and I assume on that you'll want me
20 to grant the unopposed ones and we'll hear argument on the one
21 that is opposed?

22 MR. LEDERMAN: Yes, Your Honor.

23 THE COURT: Stillwater Mining Company?

24 MR. LEDERMAN: Yes, Your Honor.

25 THE COURT: All right, it's granted for the non-

1 objectors. And I'll hear appearances for those who are going
2 to appear on Stillwater Mining.

3 MR. NOVOD: Good morning, Your Honor. Gordon Novod of
4 the law firm of Kramer Levin Naftalis & Frankel. I'm joined by
5 my colleague Jennifer Sharret on behalf of the creditors'
6 committee of Motors Liquidation Company.

7 THE COURT: Okay, Mr. Novod.

8 MS. HESTON: Good morning, Your Honor. Mary Jo Heston
9 from the law firm of Lane Powell, appearing for Stillwater
10 Mining Company.

11 THE COURT: Okay, Ms. Heston.

12 MS. PIAZZA: Good morning, Your Honor. Deborah
13 Piazza, Hodgson Russ, appearing for Stillwater Mining Company.

14 THE COURT: All right, Ms. Piazza.

15 Mr. Lederman, are you going to argue Stillwater Mining
16 on behalf of the debtor?

17 MR. LEDERMAN: I am, Your Honor.

18 THE COURT: Okay.

19 MR. LEDERMAN: Would you like to hear the debtors
20 first or the objector, Your Honor?

21 THE COURT: I think on this one I'll hear the debtor
22 first.

23 MR. LEDERMAN: Sure, Your Honor. The debtors submit
24 that this contract, which we propose to reject, is an exercise
25 of the debtors' business judgment that is prototypical for 365

1 and exactly what Congress intended for a proper rejection to
2 maximize the benefit for the estate and the recovery for the
3 creditors.

4 What we have here is a metal supply contract for
5 rhodium and palladium that has a floor price on it that
6 requires the debtors to purchase palladium at 300 dollars per
7 ounce, 10,000 ounces per month. It increases in 2010 to 20,000
8 ounces per month, again at 300 per ounce.

9 The current spot market on palladium, Your Honor, is
10 south of 250 dollars an ounce. So the debtors right now, if
11 they're forced to continue to perform under this contract, will
12 be required to perform at a loss of approximately 500,000
13 dollars a month.

14 It is also important to note that following a 363
15 transaction the debtors no longer manufacture vehicles;
16 therefore, they have absolutely no use for this metal
17 whatsoever. And what they'd have to do is be forced to go out
18 into the open market and resell this metal at a substantial
19 loss if they're forced to continue performance under the
20 contract.

21 General Motors, New General Motors, was not interested
22 in purchasing this contract because it had a floor price on it
23 and they would have also been having to perform under the
24 contract at a loss. There were other supply contracts that
25 were assumed and assigned to New GM; they were contracts that

1 had metal pricing for palladium and rhodium based on spot
2 market prices. So they're much more advantageous for New
3 General Motors. Those are the ones that they decided to
4 continue forward with.

5 Contrary to what the objectors state in their papers,
6 it had absolutely nothing to do with the location of the
7 supplier; it had to do with the terms of the contract. The
8 terms of those contracts were a spot market contract. They
9 were much more advantageous. Couple that with the fact, as
10 Your Honor is well aware, the New General Motors is going to be
11 a much more leaner, efficient manufacturer, they have a reduced
12 need for the metal supply. So those two factors were decisive
13 in New General Motors not wanting to continue with the contract
14 of Stillwater. Again, nothing to do with the location of the
15 manufacturers.

16 I also note that the objectors are majority owned by
17 one of the companies that they reference in their objection as
18 being one of the foreign suppliers that New General Motors is
19 continuing relationship with.

20 So those two factors, we think, under 365, one, that
21 it's an over-market contract in which the debtors would have to
22 continue to perform at a substantial loss for if Your Honor
23 forced continued performance, and second, that there's
24 absolutely no need for this metal in any case. We think it's a
25 sound exercise of the business judgment of the debtor to seek

1 rejection of this contract.

2 I'd like to briefly address the objectors' points that
3 they raise in their motion: The first I think we addressed was
4 that it's not a proper exercise of the debtors' business
5 judgment; the second is that the rejection would cause
6 disproportionate harm to Stillwater. Again, as I stated, the
7 post-mitigation loss of the debtors having to continue this
8 contract would be, at a minimum, 500,000 dollars a month, and
9 that assumes that they can even sell this metal in the open
10 market. If they're not able to sell this metal in the open
11 market, the loss could be three million dollars a month for the
12 debtors. That is a substantial risk and a substantial harm
13 that would be caused to the debtors and their estates and would
14 certainly impact recovery for the unsecured creditors, whereas
15 in Stillwater's case we don't deny it's an important contract
16 for that company. Unfortunately, that is the consequences of
17 having a contract with a company that goes through this
18 process.

19 As they stated in their papers, this contract
20 represents approximately ten percent of their revenue in 2008
21 and approximately eleven percent of their revenue year to date.
22 So while it's an important contract, it is not an
23 overwhelmingly substantial portion of their business. Their
24 management has stated publicly that they will be able to
25 continue on just fine if this contract is rejected.

1 I think the other important issue that's raised in
2 their papers is the contract rejection date, when this
3 rejection will be effective. The debtors propose the rejection
4 date should be July 9th. We filed this motion on July 7th.
5 Stillwater received the notice of motion and the actual motion
6 papers via overnight mail on July 8th. Also, there was
7 communications and negotiations of this contract that started
8 back in Q4 of 2008 and continued up through the debtors'
9 filing.

10 THE COURT: Pause, please --

11 MR. LEDERMAN: Sure.

12 THE COURT: -- Mr. Lederman.

13 MR. LEDERMAN: Sure.

14 THE COURT: When I reviewed the papers, it appeared to
15 me that the principal issue was the appropriate rejection date.
16 Did Stillwater Mining ship after you told them that you were
17 about to reject, in other words, after the motion had actually
18 been filed?

19 MR. LEDERMAN: Stillwater's counsel, I think, will be
20 able to address that, but I believe the answer is that they
21 attempted to ship on July 20th. Certainly the motion was filed
22 well before then. Also, the debtors reached out --

23 THE COURT: Forgive me, Mr. Lederman. You didn't
24 answer my question.

25 MR. LEDERMAN: I believe Stillwater attempted to ship

1 on July 20th. The debtors did not accept that shipment.

2 THE COURT: All right, so you're not holding rhodium
3 and palladium that they had shipped after the motion was filed?

4 MR. LEDERMAN: That's correct, not for the month of
5 July, Your Honor.

6 THE COURT: Well --

7 MR. LEDERMAN: There's --

8 THE COURT: Well, at any time? In other words, to
9 what extent, if any, do I have to figure out what is fair to
10 both sides in terms of paying them for stuff that was shipped
11 and accepted between the time the motion was filed and today?

12 MR. LEDERMAN: There is nothing that's been accepted
13 by the debtors since the motion was filed, Your Honor.

14 THE COURT: All right. Continue, please.

15 MR. LEDERMAN: So we contend since, again, the
16 proposed shipment date, as Stillwater put in their objection,
17 was July 20th, we wanted to make sure we got this motion on
18 file and got proper notice to Stillwater well before the
19 proposed ship date. The debtors did that in two matters, Your
20 Honor. First, it was communicated on July 1st to Stillwater
21 that the debtors were intending to reject that contract, they
22 should not ship metals for the month of July. They explained
23 the rationale at that time that it was an over-market contract,
24 the debtors no longer need the supply because they don't
25 manufacture vehicles.

1 Secondly, we filed our motion and they received notice
2 well ahead of the --

3 THE COURT: Pause, please --

4 MR. LEDERMAN: Yes, Your Honor.

5 THE COURT: -- Mr. Lederman. In light of the answer
6 to the question you just gave me that there was no shipment
7 between the time that you first filed the motion and now, what
8 difference does the rejection date make?

9 MR. LEDERMAN: Your Honor, I think Stillwater did
10 attempt to ship on July 20th. The debtors did not accept that
11 shipment. So that's why we wanted to make the rejection date
12 prior to this hearing.

13 THE COURT: I see. So your point is that if I didn't
14 make it retroactive, then arguably GM would have been obligated
15 to accept that shipment?

16 MR. LEDERMAN: Arguably, Your Honor. We again would
17 contend that this in no way provides any benefit to the estate.
18 So it would still be a pre-petition unsecured claim. There
19 would not be an administrative expense that would accrue. But
20 we wanted to prevent even having to go there and made sure to
21 provide ample advance notice to Stillwater not to ship on July
22 20th, and that's why we made the date July 9th.

23 THE COURT: All right. Continue, please.

24 MR. LEDERMAN: I think those are the primary arguments
25 that the debtors would like to put forth regarding this issue.

1 And we think that it is, you know, a prototypical example of
2 365 for the debtors to reject this contract. While the law and
3 365 itself is not clear on an effective rejection date, we
4 think there's ample support in the case law for Your Honor
5 making the rejection date retroactive to this hearing and to
6 the order.

7 We think that Bethlehem Steel, which we cite in our
8 papers, is a case that is directly on point here. It was also
9 a supply contract; in that instance it was for gas. The
10 debtors also were obligated to purchase the gas at a floor
11 price that was well above the current spot market price at that
12 time. They were able to ascertain supply from another gas
13 supplier and they sought rejection of the gas supply a date
14 effective before the hearing. They provided advance notice to
15 the gas supplier, just like the situation is here, and the
16 Court in that case allowed for the retroactive rejection. We
17 would ask for the same relief.

18 THE COURT: Okay. Thank you.

19 MR. LEDERMAN: Thank you, Your Honor.

20 THE COURT: All right, do I properly assume that it
21 would be Ms. Heston? Oh, forgive me, creditors' committee?

22 MR. NOVOD: Yes. Again, for the record, Your Honor,
23 Gordon Novod of the law firm of Kramer Levin Naftalis & Frankel
24 on behalf of the committee. Rather than repeat all the
25 comments that the debtors made previously on the record, I just

1 want to reiterate for the Court that the creditors' committee
2 supports the debtors' judgment here and their election to
3 reject this contract. There is no benefit for the old estate
4 that the assumption of this contract can have, as the old
5 estate is not in the business of manufacturing cars. I'd also
6 note for Your Honor's benefit that obviously the accrual of
7 administrative expense costs with respect to the assumption of
8 this contract would diminish the wind-down budget, which
9 obviously, based on our prior record of this hearing and the
10 sale hearing which concluded on July 2nd, is of great matter
11 and significance to the creditors' committee.

12 That said, Old GM should not be in a position where it
13 has to bear the burden of this contract. The debtors, in their
14 business judgment, have elected to reject this contract. And
15 as you've heard from the debtors, they provided notice prior to
16 the attempted shipment date of this month. And it's in the
17 best interest of the debtors and the unsecured creditors of Old
18 GM to reject this contract nunc pro tunc to the date on which
19 the motion was filed.

20 THE COURT: All right.

21 MR. NOVOD: Thank you.

22 Ms. Heston?

23 MS. HESTON: Thank you. For the record, Mary Jo
24 Heston appearing for Stillwater Mining Company, Your Honor.
25 One thing that I would like to say at the outset is, in

1 reviewing the papers that have been presented by this debtor,
2 there's not a single shred of evidence presented by this debtor
3 to support this decision. There's not a single declaration --

4 THE COURT: Do you mean as of the time the motion was
5 originally filed or even now after --

6 MS. HESTON: Even now --

7 THE COURT: -- their reply has been filed?

8 MS. HESTON: -- there's not a single declaration.
9 There's not a single -- it's all ex cathedra statements by
10 counsel --

11 THE COURT: Yes, but remember, we have a case
12 management order in this case that says that allegations and
13 motion papers are taken as true unless disputed.

14 MS. HESTON: Well --

15 THE COURT: Now, to what extent do you factually
16 dispute their contentions that this is a requirements contract,
17 that it has a floor of 300 bucks per ounce, that the contract
18 obligates payments -- excuse me, taking 10,000 ounces -- I'm
19 not sure if that's per month or per year -- in 2009, 20,000 in
20 2010, and the allegation that the business happened to wind up
21 with your affiliate rather than you? Are those facts -- if I
22 gave you an evidentiary hearing on that, would you be able to
23 contest any of those facts?

24 MS. HESTON: I would be able to contest several of
25 those facts, Your Honor.

1 THE COURT: Be more specific.

2 MS. HESTON: Okay. First of all, all of the
3 statements concerning negotiations on this contract, all of the
4 negotiations on this contract, and there's in the record, in
5 the form of the contract that they put into the record, which
6 by the way had a confidentiality clause in it, there was
7 modifications of the contract, and all discussions related to
8 our contract prior to July 4th when we were first informed of
9 the decision to not assume and assign this contract, reduced --
10 were related to reduction of the quantity. And there was never
11 a single discussion concerning the floor price.

12 So there are --

13 THE COURT: Forgive me. You're talking about
14 discussions to modify the existing contract. To what extent,
15 Ms. Heston, do I have factual disputes concerning what the
16 contract provides?

17 MS. HESTON: You have factual disputes concerning the
18 amount that is currently under the amendment for the contract;
19 it's 7,500. And the parties had been in negotiations in terms
20 of a third amendment. You have disputes in terms of what the
21 decision was and what the context of the decision was, because
22 in every contract on a commodity the parties seek to hedge.
23 And so the question in this case is why did they assume and
24 assign the other two contracts and not assume and assign our
25 particular contract?

1 THE COURT: Forgive me. That's a matter of confession
2 and avoidance. And I will take your legal argument on those
3 matters after I ascertain the extent to which I need to give
4 you an evidentiary hearing on disputed facts --

5 MS. HESTON: Okay.

6 THE COURT: -- or whether on undisputed facts the
7 debtor has already established its entitlement to rely upon the
8 business judgment rule.

9 MS. HESTON: There is --

10 THE COURT: Is there a difference -- forgive me,
11 Ms. Heston. Since you're having some delays, if not
12 difficulty, in answering my specific questions, I need to do
13 this just like it's a cross-examination.

14 MS. HESTON: Sure.

15 THE COURT: Do you disagree that the floor on this
16 contract is 300 dollars per ounce?

17 MS. HESTON: No.

18 THE COURT: All right. Do you dispute the fact that
19 GM no longer makes vehicles?

20 MS. HESTON: No.

21 THE COURT: Do you dispute the fact that the price on
22 this is fixed as a floor as compared and contrasted to spot
23 pricing?

24 MS. HESTON: No.

25 THE COURT: Do you dispute the fact that one of the

1 two other companies that got the business for the palladium and
2 the rhodium is a corporate affiliate of yours?

3 MS. HESTON: They are a majority owner but they are --
4 they have nothing to do with our management. They are
5 precluded from all management decisions. The fact that they
6 got that contract, we derive no benefit from that, Your Honor.
7 So the -- and the fact that it was -- that they happen to own
8 stock, it's a publicly traded company, Your Honor. And they
9 have absolutely nothing to do with our mining operations which
10 are wholly U.S.-owned and U.S.-run with U.S. employees.

11 THE COURT: If I gave you an evidentiary hearing, what
12 would you tell me about the contract that is being rejected
13 being different than what the debtor and the creditors'
14 committee say it provides?

15 MS. HESTON: I would tell you that, first of all, this
16 concept that's set forth in the reply that there are going to
17 be all of these losses is insulting to the intelligence of
18 anybody that has an even basic rudimentary understanding of
19 commodity pricing. Everyone -- we have a floor in our
20 contract, but if you look there is also a ceiling. And so, for
21 example, in 2008 the pricing was extremely favorable under this
22 contract for the first nine months of 2008. And as set forth
23 in our papers, the pricing on these metals is extremely
24 volatile.

25 So, you know, and we don't know what the other

1 contracts were, but everyone attempts to hedge, and in the
2 commodities market that that hedging sometimes works for you
3 and sometimes works against you. So this whole concept that
4 we're going to project out, based on today's palladium price,
5 what the losses are, is ridiculous.

6 And I really -- I guess I apologize, but I am
7 offended. We all throw around these concepts of business
8 judgment or adequate protection or all the words that we have
9 used in all of our careers, but those decisions have to be made
10 in -- I think in a business context. And there's nothing in
11 this record in terms of -- and if you look -- I mean, I read
12 every word of your decision, Your Honor. And, you know, if you
13 look at the context of this business judgment rule, I think you
14 have to look at it in the context of preserving U.S. jobs.

15 And the concept that Old GM and New GM, as set forth
16 in our papers and in the purchase and sale agreement -- this is
17 clearly a joint decision by these parties to assume and assign
18 these contracts.

19 THE COURT: Well, I think that's a permissible
20 inference for me to draw, but wouldn't it be an equally
21 permissible inference for me to draw that, if Stillwater Mining
22 and its Russian sixty-one percent majority stockholder cared so
23 much about saving U.S. jobs, it would not have been impossible
24 for the sixty-one percent stockholder to say listen, for the
25 same price we'll fill the New GM needs with palladium and

1 rhodium extracted in the U.S. instead of bringing it in from
2 Russia?

3 MS. HESTON: Your Honor, as indicated, the Russian
4 majority owner is not involved in any way in our management.
5 They do not -- the parties --

6 THE COURT: Do you think your management could have
7 picked up the phone --

8 MS. HESTON: No.

9 THE COURT: -- and talked to the Russian parent if
10 they're not obligated to listen to orders from the Russian
11 parent?

12 MS. HESTON: No. They don't discuss and there's
13 nobody on our board from them. They're precluded from being on
14 our board because of the Russian ownership. And, candidly,
15 there was a discussion after the decision was made and they're
16 laughing at us all. I mean, the thought that, you know -- do
17 you think for one second a Russian company -- if this was a
18 Russian-backed company that they would, you know, have assumed
19 the U.S. contract over the Russian contract, I mean, it's
20 absurd.

21 So the whole concept of --

22 THE COURT: Did your company offer to give New GM
23 spot -- the same economic deal that the Russian company did?

24 MS. HESTON: They never asked. I talked to my
25 client -- first of all, you have to understand, Your Honor,

1 what was in the initial pleading was not what was in the reply,
2 which was received at 6 o'clock last night and I barely had a
3 chance to talk to my client. But I talked to them about
4 several factual inaccuracies, including the ones that we have
5 discussed. One of them is that this concept that there was all
6 of these discussions, Your Honor, is simply false. What was
7 discussed was a reduction of the amount of palladium provided
8 to this debtor. They never discussed with our client,
9 according to the parties that I talked to and my client last
10 night, they never discussed a floor price. They never said --
11 and, in fact, as set forth in our declarations, when we
12 received the call for the first time on July 4th and talked to
13 this David -- I forget his last name, I apologize, it's in the
14 declaration -- but talked to the party that we had been dealing
15 with at GM, he was just obviously flabbergasted himself by the
16 decision. He basically said I'm really sorry, the lawyers have
17 made this decision, it's not based on price. That's what he
18 told our client. And I recognize that's hearsay but that's
19 what we were told.

20 My client has told me that they were never asked --
21 they were never told that the flooring price was the problem
22 here. And we have shown good faith in renegotiating this
23 contract, not once, not twice but there was a third amendment
24 to the contract that had been orally agreed to. And, again, it
25 was not based on flooring price; it was based on the amount of

1 palladium to be provided to this debtor for the rest of the
2 year. So until July 4th we were told that our contract was
3 going to be assumed and assigned as part of this process.

4 And I guess one last thing -- and so I guess I think
5 there is -- I think that, based on this record, there are
6 several factual disputes and that an evidentiary hearing should
7 be held with limited discovery rights.

8 THE COURT: All right. Thank you.

9 Reply?

10 Mr. Lederman.

11 MR. LEDERMAN: Thank you, Your Honor. At the outset,
12 the debtors would like to note that we had talked to
13 Stillwater's counsel and we had agreed that this would not be
14 an evidentiary hearing. We explained and we thought the
15 uncontested facts were clear and if Your Honor wished for an
16 evidentiary hearing we could set that for a later date but that
17 we didn't think that that would be necessary.

18 THE COURT: No, don't focus on what you said to them;
19 focus on what they said back to you. They agreed that it was
20 not going to be an evidentiary hearing?

21 MR. LEDERMAN: That's correct, Your Honor.

22 THE COURT: And that today would not be an evidentiary
23 hearing or that there would not be an evidentiary hearing at
24 any point?

25 MR. LEDERMAN: No, that today would not be an

1 evidentiary hearing.

2 THE COURT: Yeah, but you're not focusing on the
3 distinction I'm making. The question I'm asking is whether the
4 agreement you had with Stillwater Mining's counsel was that
5 merely that today would not be an evidentiary hearing or that
6 the entire controversy could be resolved without an evidentiary
7 hearing.

8 MR. LEDERMAN: No, just merely that today would not be
9 an evidentiary hearing.

10 THE COURT: You understand why that's not responsive,
11 then, to what I need to ascertain?

12 MR. LEDERMAN: I understand, Your Honor. I just
13 wanted to point that at the outset and I'll go into the
14 substantive arguments now.

15 As Your Honor's well aware, we think under 365 that
16 contract rejection is intended to be a summary hearing to
17 determine whether or not the debtors have made a sound business
18 judgment in seeking to reject the contract.

19 The undisputed facts here, as Your Honor elicited from
20 Stillwater's counsel, are clear. There is a supply contract
21 for which the debtors have absolutely no use for the supply.
22 They no longer manufacture vehicles; therefore, at any price
23 they wouldn't need it. However, more importantly, the contract
24 terms are clear. It has a floor price of 300 dollars per
25 ounce, 10,000 ounces per month, which escalates to 20,000

1 ounces per month. The debtors would be forced to go to those
2 markets --

3 THE COURT: Pause please, Mr. Lederman.

4 MR. LEDERMAN: Yes, Your Honor.

5 THE COURT: Do you agree or disagree with Ms. Heston
6 when she says that you're wrong when you say it's 10,000, it
7 should only be 7,500?

8 MR. LEDERMAN: We disagree, but even if it was 7,500
9 we don't think the outcome is any different. So even if we
10 concede that it's 7,500, it's still 7,500 ounces at floor price
11 of 300 for metal that can't be used by the debtors and a spot
12 price that is 50 dollars above what the current market price
13 is. So the post-mitigation loss of the debtors would still be
14 substantial, even at 7,500. So even if we concede that, which
15 we don't think is correct, but we're fine to concede that we
16 don't think the outcome changes.

17 I also want to bring up the point that, again, the
18 debtors are cognizant and aware that this is an important
19 contract for Stillwater and that it could have an impact on
20 their business and indeed maybe even the local economy. But we
21 think that Judge Gonzalez in Chrysler and the Pilgrims case
22 makes it pretty clear that that is not a determinative factor
23 that this Court should weigh in considering whether or not it's
24 a proper exercise of the debtors' business judgment to reject
25 the contract; it is the harm that it will cause the estate, the

1 harm that it will cause its creditors.

2 And we think here the undisputed facts are clear that
3 if the debtors are forced to continue to perform they would be
4 at a substantial loss; it would be a substantial drain on the
5 estate. We think those are undisputed facts.

6 We think that having an evidentiary hearing would be a
7 cost that is unnecessary for the debtors. It would be time-
8 consuming and expensive and a further drain on the estate. And
9 we don't think, at all, it changes the outcome. We think the
10 undisputed facts substantiate clearly that the debtors are
11 exercising their sound business judgment in seeking rejection
12 of this contract.

13 THE COURT: Okay.

14 MR. LEDERMAN: And we think, in fact, it would be a
15 breach of our fiduciary duties if we didn't seek to reject it.

16 THE COURT: All right.

17 Mr. Novod, anything further?

18 MR. NOVOD: Your Honor, Gordon Novod again, for the
19 record. I just wanted to echo our support for the debtors
20 again. This is not a contract which the debtors are going to
21 be using in their business. No administrative expenses should
22 accrue in connection with this contract and we believe that the
23 contract should be rejected as the debtors have requested in
24 their papers.

25 THE COURT: All right.

1 MR. NOVOD: Thank you.

2 THE COURT: Thank you. All right. We'll take a
3 recess. I want everybody back by 10:30.

4 (Recess from 10:17 a.m. until 11:30 a.m.)

5 THE COURT: I apologize for keeping you all waiting.
6 In this contested matter in the Chapter 11 cases of General
7 Motors Corporation, now known as Motors Liquidation Corporation
8 and its affiliates, the debtors move to reject a contract for
9 the purchase of rhodium and palladium with Stillwater Mining,
10 described more fully below.

11 After appropriate consideration, I've determined that
12 there are no material disputed issues of fact and that the
13 motion can and should be decided on the present record without
14 the need for a supplemental evidentiary hearing. The motion is
15 granted.

16 The following are my findings of fact, conclusions of
17 law and bases for the exercise of my discretion in this regard.
18 As facts, I find that GM, referred to for clarity by many as
19 Old GM and now known as Motors Liquidation Corporation, entered
20 into a requirements contract dated August 8, 2007 with
21 Stillwater Mining for the purchase of palladium and rhodium
22 used in the manufacture of the catalytic converters that are in
23 modern motor vehicles. The contract was twice amended on
24 December 9, 2008 and on March 5, 2009, respectively. See Stark
25 (ph.) Declaration, paragraph 4.

1 Under the contract, Old GM was required to accept a
2 fixed amount of palladium at a floor price of 300 dollars per
3 ounce. Old GM was obligated to buy 10,000 ounces per month of
4 palladium in 2009 and 20,000 ounces per month in 2010. See old
5 contract section 4(a). With that price and quantity, the
6 palladium would cost Old GM three million per month in 2009 and
7 six million per month in 2010.

8 Also, under the original contract Old GM was
9 originally obligated to accept 500 ounces of rhodium each month
10 starting in January 2008 and ending in December 2012. See
11 contract section 4(b). Though the quantities were later
12 changed in the first and second amendments to provide that for
13 the first quarter of calendar 2009, the rhodium quantity would
14 be reduced from 500 to 300 ounces per month and then to 200
15 ounces in April, zero ounces in May and June. And under the
16 first and then second amendments, various mechanisms were
17 created for a kind of negotiation process to deal with rhodium
18 needs for periods thereafter.

19 There was some oral argument with respect to different
20 numbers. My findings of fact are based on the numbers as I
21 read them from the underlying contractual documents, although I
22 will find, in the event of any appeal, that the differences
23 would not be material under any circumstances.

24 Palladium is a commodity, and the spot price for
25 palladium rises and falls with market conditions. At-present

1 market conditions, the 300 dollars per ounce that GM would have
2 to pay for the palladium, assuming that Old GM wanted it or
3 needed it, would be substantially above market. As of July 10,
4 the date of the closing of Old GM's recent Section 363
5 transaction, the spot price was approximately 235 dollars per
6 ounce. The average daily price for palladium during 2009 has
7 been 197 dollars per ounce. See Stillwater Mining's 10-K.

8 While I well understand that people enter into
9 contract at fixed prices to address the fact that commodity
10 prices go up and down, the undisputed fact is that the contract
11 price is substantially in excess of the sport market price.
12 Also, of course, though this is a hugely important point and
13 perhaps needed to be addressed first, Old GM no longer makes
14 cars and trucks; it does not need the palladium or the rhodium.
15 And under the contract, Old GM -- remember that's Motors
16 Liquidation Company -- is forced to expend three million
17 dollars per month for the remainder of 2009, and six million
18 dollars per month beginning in 2010 for palladium that it does
19 not need or use. I further note, assuming arguendo that it
20 were relevant, that even New GM would not require increased
21 palladium now that what is surviving is downsized, even at the
22 fair market price, much less than the higher-than-market price
23 under this contract.

24 It's a fair inference to draw that Old GM and New GM
25 conferred when New GM decided which contracts New GM wished to

1 assume and that this contract wasn't one of them. But
2 ultimately the decision as to whether to take an assumption of
3 this agreement, and thus to take the agreement itself, was New
4 GM's, not the decision of Motors Liquidation Company. And when
5 this contract wasn't assumed by New GM, Motors Liquidation
6 Company, at the risk of stating the obvious, didn't need the
7 palladium itself.

8 There is no cure due on the contract. See Stark
9 declaration, paragraph 8. However, it appears that Stillwater
10 Mining attempted to deliver product on or about July 20 and its
11 delivery was refused. Thus, I do not need to deal with what
12 would have happened if GM was holding palladium that had been
13 delivered under the contract in the period in between the time
14 of its motion to reject and the time of this hearing.

15 Though these facts ultimately are not relevant, I
16 find, for the sake of completeness, that Stillwater is a U.S.
17 manufacturer employing U.S. workers, that two other entities
18 will be supplying the product that Stillwater provided to New
19 GM, one of which is a Russian entity that is the sixty-one
20 percent majority stockholder of Stillwater Mining.

21 Given Motors Liquidation Company's right to relief
22 under these undisputed facts, I don't need to find additional
23 facts such as what may have been discussed between the parties
24 vis-a-vis a consensual resolution that might have obviated the
25 motion to reject or reasons anyone at Old GM might have given

1 for its decision to reject.

2 Now turning to my conclusions of law and bases for the
3 exercise of my discretion on this motion, I find, as
4 conclusions of law or mixed questions of fact and law, that
5 courts generally will not second-guess a debtor's business
6 judgment concerning the rejection of an executory contract.
7 See, for example, *In re Riodizio* 204 B.R. 417, 424 (Bankr.
8 S.D.N.Y. 1997) and *In re Farmore* 204 B.R. 948, 951-952 (Bankr.
9 N.D. Ohio, 1997) and that the reasons underlying the debtor's
10 business judgment here are both apparent and obvious in fact.

11 The purpose beyond allowing debtors to reject
12 executory contracts is to allow them to abandon burdensome
13 property. See, for example, *In re Orion Pictures*, 4 F.3d 1095,
14 1098, a decision of the Second Circuit, and *In re Old Car Co*
15 LLC, that being the liquidation name for the former Chrysler
16 Corporation, 2009 B.R. LEXIS 1382, p. 5. Here, Motors
17 Liquidation's business purpose is easy to understand, as
18 counsel for the creditors' committee, supporting the debtors'
19 motion, made clear: Motors Liquidation no longer makes cars
20 and trucks; it doesn't need any product.

21 Moreover, the contract requires a purchase of
22 palladium and rhodium in minimum quantities that aren't needed.
23 And the price for the palladium is way over the spot price;
24 it's way over market. Even if Motors Liquidation needed the
25 palladium and the rhodium, which it obviously doesn't, it's a

1 classic example of a contract that's burdensome to the estate.

2 Stillwater Mining notes that this contract provides
3 that it was about eleven to twelve percent of its revenue. And
4 I assume that losing this business is indeed a hardship to
5 Stillwater Mining. I understand that and I sympathize with it.
6 But this is, sadly, one of the many decisions that I've been
7 forced to make in this case and in others, and that I may well
8 have to make in the future in this case and in others, where I
9 have to deal with the unfortunate consequences of corporate
10 financial distress. So that others do not suffer even more,
11 the Bankruptcy Code provides means for debtors to shed
12 burdensome obligations, of which this is a classic example.

13 For purposes of this motion, I must consider the
14 reasons underlying the debtors' business judgment. And even if
15 I were to apply the more rigorous test of what's in the best
16 interests of the estate, I'd have to reach the same conclusion
17 as comments made by creditors' committee's counsel strongly
18 suggest. Likewise, there's, unfortunately or fortunately but
19 simply as a matter of reality, no basis in the law, nor has
20 been any cited to me, for considering hardship to the
21 counterparty on a motion of this character where, for example,
22 Congress hasn't directed us to consider competing
23 considerations, as we're required to consider for collective
24 bargaining agreements, as noted by Judge Lynn in Pilgrim's
25 Pride Corp., 403 B.R. 413, 425 (Bankr. N.D. Texas, 2009), just

1 a short time ago: While the impact of rejection on the
2 counterparty's community may be significant, that is not an
3 uncommon result of the cutbacks that typically accompany a
4 restructuring in Chapter 11. Judge Lynn went on to say, in
5 Pilgrim's Pride, whether through contract rejections or plant
6 closings, contraction of a debtor's business will often have a
7 harmful effect for one or more local economies.

8 If the Bankruptcy Court must second-guess every choice
9 by a trustee or debtor-in-possession that may economically harm
10 any given locale, the business judgment rule applicable to
11 contract rejection and many other decisions in the Chapter 11
12 process will be swallowed by a public policy exception.

13 Also, of course, I note that Stillwater Mining will
14 still have the ability to file a proof of claim and presumably
15 to recover on a claim for its resulting rejection damages, a
16 claim for the loss of the profit it would have made under this
17 contract.

18 Turning then to the matter of the appropriate
19 rejection date, I start with the fact, as I and other courts
20 have held previously, that a bankruptcy court may make its
21 rejection order retroactive under appropriate circumstances,
22 or, putting it in the terms that we more commonly put it, to
23 make its determination nunc pro tunc to the time of the filing
24 of the motion.

25 I did so for a much longer period in the Adelphia

1 Business Solutions case, and my decision to make it retroactive
2 there for a period of several years was ultimately affirmed by
3 the circuit in Adelphia Business Solutions, Inc. v. Abnos, 482
4 F.3d 602. There the circuit assumed, without deciding, that
5 the power exists, when it noted the decisions of many other
6 courts that had recognized this power. See Pacific Shores
7 Development LLC vs. At Home Corp., In re At Home Corp.,
8 392 F.3d 1064, 1071, (9th Cir. 2004); Thinking Machines Corp.
9 vs. Mellon Financial Services Corp, In re Thinking Machines
10 Corp., 67 F.3d 1021, 1028 (1st Cir. 1995); and Constant Limited
11 Partnership vs. Jamesway Corp., In Re Jamesway Corp.,
12 179 B.R. 33, 39 (S.D.N.Y. 1995).

13 Here the duration of the requested nunc pro tunc
14 period is very modest, going back only about two weeks to the
15 filing of the motion after Old GM had long before given notice
16 of its intention to reject and where Old GM declined delivery
17 of the product and thus was not unjustly enriched by its
18 contract counterparty providing it with something for which
19 appropriate payment hadn't been made.

20 In fact, if I had permitted Stillwater Mining to force
21 Motors Liquidation Corp. to accept delivery of product that
22 Motors Liquidation Corp. didn't want or need, that would have
23 been an even more unjust result, especially if Motors
24 Liquidation had then had to dispose of that unneeded product at
25 a loss. Making the effective date of the rejection nunc pro

1 tunc to the date of the filing of the motion under these facts
2 is the just thing to do.

3 Accordingly, the debtors are to settle an order in
4 accordance with this ruling stating no more than that for the
5 reasons set forth on the record. The motion is granted. The
6 time to appeal from this decision will run from the time of the
7 entry of the ultimate order and not from the date of this
8 dictated oral decision.

9 We have no further business. We're adjourned for
10 today. Thank you.

11 (Proceedings concluded at 11:47 AM)

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I N D E X

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C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true
and accurate record of the proceedings.

Clara Rubin
AAERT Certified Transcriber (CET**D-491)

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